LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 31 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1379

CLIFFORD ARTHUR FORKERT,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

JOSEPH P. BUSCH
District Attorney of
Los Angeles County

HARRY B. SONDHEIM
Head, Appellate Division

DONALD J. KAPLAN
Deputy District Attorney

CHARLES E. BOAG
Deputy District Attorney

849 S. Broadway, 11th Floor
Los Angeles, California
Telephone: (213) 974-5915

Attorney for Respondent

SUBJECT INDEX

	Page
Statement of the Case and Facts	1
Arguments in Opposition to Petition for Writ of Certiorari:	
I	
There is no Substantial Federal Question Presented by the Appellate Department's Ruling that the Petitioner's Prior Conviction Was Constitutionally Valid	11
II	
There is no Substantial Federal Question Presented by Petitioner's Contention that He Should Have Been Permitted to Reargue His Position Before the Appellate Department After the Mills and Wicks Decision Had Been Rendered	21
III	
There is no Federal Question Presented by the Appellate Department's Refusal to Suppress the Breathalyzer Result	26
Conclusion	28

TABLE OF AUTHORITIES CITED

Page

United States Supreme Court Decisions

Argersinger v. Hamlin [1972] 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006 20

Boykin V. Alabama [1969] 395 U.S. 283, 23 L.Ed.2d 274, 89 S.Ct. 1709 . . . . 3, 11, 12, 13, 14, 15, 17 18, 19, 20, 21, 24

Halliday v. United States [1969] 394 U.S. 831, 23 L.Ed.2d 16, 89 S.Ct. 1498 20

California Supreme Court Decisions

Auto Equity Sales, Inc. v. Superior Court [1962] 57 Cal.2d 450 28

In re Tahl [1969] 1 Cal.3d 122 . . 13, 12, 14, 21

Mills v. Municipal Court and People v. Superior Court (Wicks) [1973] 10 Cal.3d 288 . . . 11, 12, 14, 15, 18, 19, 21, 22, 23, 24

People v. Newland [1940] 15 Cal.2d 678 25

People v. Redmond [1969] 71 Cal.2d 745 25

People v. Smith [1969] 70 Cal.2d 123 3

Page

People v. Sweeney [1960] 55 Cal.2d 27 25

California Courts of Appeal Decisions

Lerno v. Obergfell [1956] 221 Cal.App.2d 221 25

People v. Bates [1954] 126 Cal.App.2d 144 25

People v. Brannon [1973] 32 Cal.App.3d 971 . . . . . 27, 28

People v. Fite [1968] 267 Cal.App.2d 685 28

People v. Hardeman [1966] 244 Cal.App.2d 1 25

People v. Jablon [1958] 165 Cal.App.2d 348 25

People v. Moore [1955] 137 Cal.App.2d 197 25

People v. Wren [1969] 271 Cal.App.2d 788 28

Riley v. Dumbar [1942] 55 Cal.App.2d 452 25

Appellate Departments of the Superior Court Decisions

C.I.T. Corp. v. Biltmore Garage [1934] 3 Cal.App.2d Supp. 757. . . 6

People v. Alves [1957] 154 Cal.App. 2d Supp. 877. 6

Page

People v. Foulger [1972] 26 Cal. App.3d Supp. 1. . 23, 24, 26, 27, 28
People v. Hanggi [1968] 265 Cal. App. 2d Supp. 969 25
People v. Horak [1973] No. 97146, not reported 5, 6
People v. Shamrock, Inc. [1973] CR A 11881, not reported. . 5

California Statutes

Evidence Code Section 351. 28
Health and Safety Code Sections 436.50-436.63 26
Penal Code Section 1538.5 . . . . . 2, 3

California Rules of Court

Rule 977 6

California Regulations

17 Cal. Adm. Code, Chap. 2, Subchap. 1, Group 8, Sections 1215-1222.2 . . . . . 26, 27

Opinions of the California Attorney General

56 Ops. Cal. Atty. Gen. [1973] 38 . . 28

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1377

CLIFFORD ARTHUR FORKERT,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

---

STATEMENT OF THE CASE AND FACTS

Throughout the Petition for Writ of Certiorari a number of factual assertions are recited regarding the procedures that occurred from the inception of this case until the filing of the Petition. The Petition also sets out various evidentiary assertions as to what occurred in the trial court below. Rather than restating in detail all procedural facts and evidence below, we deem it sufficient for purposes of this response to the Petition to point

out our view of certain relevant factual assertions[1] in the Petition with which we disagree and to set out relevant matters that were either omitted by petitioner or that may require clarification.

Petitioner recites on page 8: "On September 27, 1972 the case was called for jury trial. On appellant Forkert's motion the docket sheet in error refers to Motion to Strike Prior Conviction on Constitutional Grounds as follows, 'proceedings proceeded as to motion to suppress pursuant to Section 1538.5 Penal Code'." However, the docket entries for September 27, 1972 only state: "on Defendant's Motion proceedings proceeded as to motion to suppress pursuant to Section 1538.5 Penal Code." (Docket No. M 062765, Municipal Court of the Alhambra Judicial District, County of Los Angeles, State of Calfifornia,[2] entry for Sep. 27, 1972.) Thus, not only does the docket not support the representation that this was a Motion to Strike a Prior Conviction but it affirmatively rules out that possibility because

---

1. There are a number of factual assertions in the Petition with which we disagree, but which would not appear material to the present proceedings.

2. Docket No. M 062765 is hereinafter referred to as "Docket."

it states that this motion was made pursuant to California Penal Code section 1538.5. Under California law, all section 1538.5 motions to suppress are restricted to Fourth Amendment grounds (e.g., see People v. Smith [1969] 70 Cal.2d 123, 128) and of course a motion to strike prior convictions does not entail the Fourth Amendment, nor do the principles enumerated in Boykin v. Alabama [1969] 395 U.S. 238, 89 S.Ct. 1709, 86 L.Ed. 1302, or in In re Tahl [1969] 1 Cal.3d 122.

On pages 11 and 12, petitioner discusses his written waiver of rights and written plea of guilty filed with the Municipal Court of the Whittier Judicial District on March 10, 1972, which of course is the prior conviction that is the subject of the Petition. In the discussion, petitioner refers to some of the statements in that document that he initialed but omits mentioning others that we deem highly material. For example, petitioner does not mention that he initialed statement number 1, that reads: ". . . I understand that I am charged with the offense of 23102 A-. . . .", statement number 7, which reads: ". . . I have thoroughly [emphasis added] discussed the charge(s), the facts and the possible defenses with my attorney and he has advised

me to plead guilty to the above offense(s).", and statement number 8: ". . . I have personally initialed each of the above boxes and I understand [emphasis added] each and every one of the rights outlined above and I hereby waive [emphasis added] or give up each of them in order to enter my guilty pleas to the above charge. I am entereing [sic] a plea of guilty because I am in fact guilty and for no other reason." "Dated: March 10, 1972 Signed: Clifford W. Forkert Defendant." (DEFENDANT'S WAIVER OF CONSTITUTIONAL RIGHTS FOR GUILTY PLEA TO A MISDEMEANOR, dated March 10, 1972, signed and notarized Clifford W. Forkert, defendant.[3]) Also omitted in the Petition is statement number 9, found on the second page of that document and which was signed by petitioner's attorney, that reads: ". . . I am attorney of record and I have explained [emphasis added] each of the above rights to the defendant, and having explored the facts with him/her and studied his/her possible defenses to the charge(s) I concur in his/her

3. DEFENDANT'S WAIVER OF CONSTITUTIONAL RIGHTS FOR GUILTY PLEA TO A MISDEMEANOR is hereinafter referred to as "Written Waiver of Rights," and is Item 4 of the Clerk's Transcript on Appeal, and a People's exhibit received in evidence by the trial court on September 27, 1972.

decision to waive the above rights and to enter a plea of guilty. I further stipulate that this document may be received by the court as evidence of defendant/s intelligent waiver of these rights and that it shall be filed by the clerk as a permanent record to that waiver, I have witnessed the reading of this form by the defendant and the initiallings and signature upon it. Dated: March 10, 1972 Signed: David Baxley Attorney". (Id.)

Commencing on page 13 and continuing through page 16 of the Petition, petitioner cites portions from two cases, People v. Shamrock, Inc. [1973] CR A 11881, and People v. Horak [1973] No. 97146, and argues that they support his contention that the prior conviction (of March 10, 1972) was constitutionally infirm. Petitioner refers to these two cases by their respective filing numbers only, rather than by citation to the Official Reports of California, since neither of these cases was certified for publication. While we do not agree that these cases support petitioner's contentions, we do object to any reference to , or use of, them by petitioner; they are unpublished decisions and as such may not, under California law, be cited by any party

(except the litigants in those cases) for any purpose in any action. (Emphasis added.) (California Rules of Court, Rule 977.) Moreover, we note that one of these decisions, i.e., People v. Horak, was rendered by the Appellate Department of the Superior Court of Santa Barbara County, rather than the County from which the Petition arose, and accordingly even if it were a published opinion it would not be binding on the Appellate Department of the Superior Court of Los Angeles County (e.g., People v. Alves [1957] 154 Cal.App.2d Supp. 877, 880; C.I.T. Corp. v. Biltmore Garage [1934] 3 Cal.App.2d Supp. 757, 762).

Beginning on page 16 and concluding at the end of page 21, petitioner restates verbatim that portion of his Appellant's Opening Brief,[4] that was filed in the Appellate Department of the Superior Court of Los Angeles County and which sets out his arguments below regarding the admissibility of the breathalyzer result. Within these pages of the Petition, and intertwined with the argument then made by petitioner, are a number of factual assertions. In the

4. Appellant's Opening Brief is hereinafter cited as "A.O.B."

interest of brevity we will not set out in detail here our view of the facts embodied in the Reporter's Transcript in this matter. Instead we respectfully direct this Court's attention to pages 2-8 of our Respondent's Brief which was filed in the Appellate Department of the Superior Court of Los Angeles County in response to petitioner's Appellant's Opening Brief, and which is now part of the record before this Court.[5]

Petitioner, under the heading "Reasons for Granting Writ" on page 22 of the Petition, states: "Petitioner contends that his prior conviction was constitutionally invalid because he did not appear in court . . . at the subsequent proceeding where Counsel entered a guilty plea on his behalf and a written waiver of his constitutional rights purportedly signed by him, in his absence." (Emphasis added.) To the extent that petitioner may be suggesting by the word "purportedly" that it is not his signature on the DEFENDANT'S WAIVER OF

---

5. We have been in contact with the Clerk of the Appellate Department of the Superior Court of Los Angeles County, and it is our understanding that all documents filed with the Appellate Department in this matter below were forwarded to the United States Supreme Court.

CONSTITUTIONAL RIGHTS FOR GUILTY PLEA TO A MISDEMEANOR, dated and filed with the Municipal Court of the Whittier Judicial District of Los Angeles County on March 10, 1972, we take exception. Not only did petitioner not object to the admission of a certified copy of this document into evidence in the trial court during a pre-trial hearing on September 27, 1972 (Docket, entry for Sep. 27, 1972) but on December 7, 1972, during the course of the jury trial before the same judge, petitioner stipulated that he had been convicted of a violation of section 23102(a) on March 10, 1972 in the Municipal Court of the Whittier Judicial District and that he was in fact the defendant described in a certified copy of Docket No. M 80311 of that court (e.g., id. entry for Dec. 7, 1972). Thereafter, petitioner was found guilty by the jury of the charge and the allegation of the prior conviction of March 10, 1972. (Emphasis added.) (See e.g., id.) Docket M 80311 recites that a Clifford Arthur Forkert authorized his attorney, David Baxley, to enter a plea of guilty to section 23102(a) on March 10, 1972 in the Municipal Court of the Whittier Judicial District, that such a plea was entered, and that Clifford Arthur Forkert's

written waivers were duly filed. (See Docket No. M 80311, Municipal Court of the Whittier Judicial District, County of Los Angeles, State of California, entry for Mar. 10, 1972.[6]) THE DEFENDANT'S WAIVER OF CONSTITUTIONAL RIGHTS FOR GUILTY PLEA TO A MISDEMEANOR form was of course completed and signed by a Clifford Arthur Forkert on March 10, 1972 (Written Waiver of Rights, first page, statement number 8) whose signature was duly notarized on that same date (id., second page), and which of course was also signed on March 10, 1972 by a David Baxley, attorney (id., first page; second page, statement number 9), and this form was filed with the Municipal Court of the Whittier Judicial District (id., second page, stamp of Earl Trigon, Clerk). Moreover, Appellant's Opening Brief, which was filed below with the Appellate Department of the Superior Court and which was signed by petitioner's present attorneys, Joseph Calvin Eischen and Leslie A. Kast (A.O.B., page 15, lines 17-24), recites, to name just a few examples: "The trial court

6. Docket No. M 80311 is Item 8 of the Clerk's Transcript on Appeal and is People's exhibit 4 admitted during the jury trial below.

received in evidence People's Exhibit 4, which was a two page certified copy of the docket sheet in case No. M 80311 of appellant's conviction on the prior in Whittier Municipal Court. . . ." (emphasis added) (id., page 5, lines 9-13); "The written waiver form referred to in that docket entry . . . was designated for inclusion in the Record on Appeal as item 4 . . . . Reference to the written waiver reveals that, ... After each right, in the right-hand column, are short spaces for the individual to initial and the form is initialed by appellant. That right-hand column is headed with the words 'Deft initial after reading.' The form is signed by appellant and dated March 10, 1972. Appellant's signature is acknowledged by a Notary Public for Los Angeles County, on March 10, 1972." (emphasis added) (id., page 6, lines 6-21). Finally, these recitals in Appellant's Opening Brief are reproduced verbatim in the Petition on pages 11 and 12 (as is the whole of Appellant's Opening Brief below on pages 4 through 21 of the Petition.)

ARGUMENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THE APPELLATE DEPARTMENT'S RULING THAT THE PETITIONER'S PRIOR CONVICTION WAS CONSTITUTIONALLY VALID

The March 10, 1972 prior conviction challenged by petitioner was of course for a misdemeanor charge, and initially we recognize that this Court has never ruled that the principles enumerated in Boykin v. Alabama [1969] 395 U.S. 283, 23 L.Ed.2d 274, 89 S.Ct. 1709, are applicable to misdemeanors. We also note that the California Supreme Court in Mills v. Municipal Court and People v. Superior Court (Wicks) [1973] 10 Cal.3d 288, has made Boykin mandatory in California to all misdemeanor pleas, except to traffic infractions (Mills and Wicks, 10 Cal.3d at 302, fn. 13), of guilty or nolo contendere (id., 298, fn. 7) by represented defendants (id., 292, 297-299, 301-302, 307, 311), at least as to such pleas entered after October 25, 1973 (id., 308-311). (Emphasis added.)

Whether or not these principles were required of misdemeanor pleas entered in

California prior to October 25, 1973[7], petitioner certainly cannot urge that he was not accorded the full benefit of them at the time of his 1972 plea. The record below "on its face" unequivocally shows that petitioner was fully advised of all the constitutional rights required by Boykin v. Alabama, and its California progeny, Mills and Wicks and In re Tahl [1969] 1 Cal.3d 122, and that he voluntarily and knowingly waived these rights, and further that a complete written record of both the advisements and waivers was made and filed with the trial court that accepted his plea of guilty on March 10, 1972. (See: e.g., Written Waiver of Rights.) Not only does a complete written record exist as to the advisements and waivers but the petitioner himself has initialed that record as to each, and then signed it, and indeed his own attorney, who presumably was mindful of

---

7. It should be noted, as does the California Supreme Court, that a number of post-Boykin, and even earlier, California decisions either applied, or suggested the application of, some or all of these principles to misdemeanors prior to Mills and Wicks. (E.g., 10 Cal.3d at 291 and fn. 1, 298 and fn. 7, 301 and fn. 10, 302 and fn. 12, 303, 306 and fn. 16, 307 and fn. 17, 309; and citations therein.)

petitioner's best interests, also signed it.

Thus, whether the result of appellate mandate or the exercise of a particular trial court's discretion, petitioner *in fact* received all that is required under *Boykin*. Petitioner is therefore necessarily limited to arguing that the *form* of the advisements received and the waivers given, and the *form* of their record, was constitutionally ineffective, a proposition with which we strongly disagree. Assuming *arguendo* that *Boykin* applied to misdemeanor pleas in 1972, it is clear that the administration of rights, and the taking of waivers, in writing and through counsel, without the necessity of the defendant being present at time of plea, is constitutionally *superior* to an in court advisement and taking of waivers, verbally administered by a trial court judge,[8/]

---

8. Although a state can never limit or restrict a federal constitutional right of its citizens, it can of course always enlarge or broaden such a right for the benefit of its citizens. Thus, assuming that *Boykin* was in fact applicable to misdemeanor pleas in 1972, it would be wholly permissible under the Federal Constitution for a California court in the exercise of its own supervisory or constitutional powers, albeit a trial court, to require more than is required by *Boykin* and to utilize procedures superior to the minimum requirements set out under *Boykin*.

for a number of reasons. First, and as pointed out in Mills and Wicks, the entry of such pleas through counsel and in writing is wholly consistent with the purposes and rationale of Boykin v. Alabama (and In re Tahl, 1 Cal.3d 122), namely of insuring that the defendant is fully aware of his constitutional rights and has voluntarily and knowingly waived them, and of insuring that an adequate record of such has been made (Mills and Wicks, 10 Cal.3d at 288, 291, 297-302, 305, 308, 311). Further, as the California Supreme Court points out, not to permit entry of such pleas to misdemeanors through counsel and in writing is at odds with both federal and California law. (Emphasis added.) (Id. 304 and fn. 14.) While in felony proceedings under federal law, as well as under California statutes, the defendant must be present in court to enter a felony plea, defendants in misdemeanor prosecutions have a statutory right in California to enter a plea through counsel in their absence, and similarly have that option under the Federal Rules of Criminal Procedure. (Id. and citations thereunder.) Thus, it should not be forgotten that in a misdemeanor proceeding it is solely the defendant himself, and not the court or

prosecution, who decides if the plea is to be made in person or by counsel, and hence in all cases written pleas through counsel will be wholly the result of the defendant's own choice. (Emphasis added.) (Id., 302-311.) As was also noted in Mills and Wicks, to require a misdemeanor defendant to come back to court for no other reason than to enter an effective guilty plea will, in many instances, impose a greater burden on him than will the punishment for the crime itself. (Id.) Furthermore, not to permit misdemeanor pleas through counsel can only force very serious burdens on the administration of justice for most, if not all, trial courts of misdemeanor jurisdiction, in light of the virtual multitude of misdemeanor cases that are processed through such courts daily. (Id.)

The opinion in Mills and Wicks discusses other valid reasons why the procedure of written pleas through counsel is preferable. However, aside from that comprehensive discussion by the California Supreme Court, we submit that as a matter of common sense such pleas better implement the principles of Boykin, than those entered in person orally before a trial court. When a defendant in the more leisurely setting of

his attorney's office, or at least not in a crowded din of a misdemeanor court, reads a printed list of his rights and thereafter waives them in writing, and in addition does all this in the immediate presence of his own attorney who counsels him as to the meaning of each right and the import of each waiver, can it be seriously believed that this procedure does not produce a far more voluntary and intelligent understanding and waiver of constitutional rights than does an in court, purely verbal, procedure before a judge? Not only will the judge invariably administer these rights from the bench verbally and in rapid fire manner, leaving little opportunity for the defendant to seek an explanation -- if indeed he even hears each of them -- except perhaps to quickly turn to his attorney standing next to him, but the verbal waivers given in return will also suffer the same infirmities.[9] Moreover, in most instances misdemeanor court

---

9. Of course, in a number of instances, particularly when the plea is made pursuant to a plea bargain, prosecuting attorneys rather than the judge will verbally administer the rights and take the waiver in open court. What has been said above concerning verbal advisements by the court is no less applicable to the judicially supervised, but prosecutorial exercise, of this function.

rooms present to defendants and other laymen nothing short of a picture of chaos and noise, and in the course of one day a misdemeanor trial judge may administer such rights, and seek waivers thereof, that number in the hundreds, some of which will be given on an individual basis to a defendant and others of which will be given in masse to a number of defendants. Similarly, when a defendant executes a form such as the one now before this court, and thereafter his attorney executes the same form acknowledging that he has not only administered but explained each right, each consequence, and each waiver, this certainly produces a superior written record within the meaning of Boykin than does the recordation in a trial court docket, whether by stamps or in longhand, by a harried court clerk, amid the noise and confusion of a misdemeanor court, and who may in a single day have to make hundreds of entries in a number of dockets.

In the alternative, and assuming arguendo that Boykin did not apply to misdemeanors in 1972, then petitioner's plea was accompanied by more than was constitutionally required, however effective or not

effective its form may have been[10/], and hence on the Boykin issue the Petition fails to demonstrate any right in need of vindication or to state any justiciable controversy.

In addition to the foregoing, it should be noted that the California Supreme Court in Mills and Wicks had before it a written, misdemeanor "change of plea" form prepared by the Municipal Court of the San Diego Judicial District and which was the vehicle for an entry of plea through counsel and in the defendant's absence. (Id., 295.) On that form the defendant acknowledged the advisement of his rights, his waiver of them, and other matters, and his attorney likewise executed and signed the form acknowledging that he had instructed his client on the various rights, consequences, and waivers. (Id., 312-313.) Since the California Supreme Court totally approved both the content of the "change of plea" form and its use through counsel (id., 304-306), and

---

10. As has already been touched on at footnote 8, page 13, supra, it does not run afoul of the Federal Constitution for a state to enlarge a federal constitutional right of its citizens. Hence, assuming that Boykin did not apply to misdemeanors in 1972, a California court, even a trial court, could properly broaden the scope of Boykin to include misdemeanors.

since that form is identical in all material respects to the form executed by petitioner herein and his attorney of record, it is clear that had petitioner's written plea through counsel been entered after October 25, 1973 its validity under California standards would be unassailable. But if unassailable after the California Supreme Court affirmed that Boykin applies to misdemeanors, then a fortiori it would necessarily be even less assailable in 1972 when Boykin's standards were supposedly less strictly applied to misdemeanors in California.

Finally, the California Supreme Court's refusal in Mills and Wicks to give Boykin mandatory retroactive application as to misdemeanor pleas does not raise a substantial federal issue. Assuming that Boykin does not apply to misdemeanors under the Federal Constitution, or at least did not apply to them prior to the decision in Mills and Wicks, then obviously this issue is moot since the Federal Constitution then would not preclude California from adopting a prospective or a retroactive approach to Boykin or from simply rejecting it altogether. On the other hand, assuming, without conceding, that Boykin does apply to misdemeanors, it is nevertheless clearly permissible for a

state court to implement Boykin prospectively vis-a-vis misdemeanors. The Boykin decision itself involved a felony, yet even as to felony application that decision did not preclude prospective implementation only. Moreover, since the underlying prophylactic purpose of Boykin by its very nature suggests only prospective effect, a fortiori extension of that underlying purpose to misdemeanors implicitly presumes only prospective treatment. Indeed, we know of no post-Boykin decision from this Court that has even intimated that state implementation of Boykin principles could not be prospective only. In contrast, several decisions of this Court, involving in part Boykin principles, have by their language indicated a prospective effect only. (E.g., Argersinger v. Hamlin [1972] 407 U.S. 25, 40, 32 L.Ed.2d 530, 540, 92 S.Ct. 2006, 2014.) Lastly, and significantly, this Court's own three prong standard for determining whether constitutional rights will be imposed retroactively or only prospectively, ipso facto permits prospective only imposition of Boykin to misdemeanors (see, Halliday v. United States [1969] 394 U.S. 813, 832, 23 L.Ed.2d 16, 19, [89 S.Ct. 1498]), and indeed these very standards were properly

applied to misdemeanors by the California Supreme Court in Mills and Wicks to arrive at the same conclusion (10 Cal.3d at 308-311).[11]

II

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY PETITIONER'S CONTENTION THAT HE SHOULD HAVE BEEN PERMITTED TO REARGUE HIS POSITION BEFORE THE APPELLATE DEPARTMENT AFTER THE MILLS AND WICKS DECISION HAD BEEN RENDERED

Petitioner contends in effect that he was denied due process in not being permitted to reargue his position before the Appellate Department of the Superior Court after it had received the California Supreme Court's decision in Mills and Wicks. In support of this contention petitioner makes a number of factual representations to the effect that the Appellate Department explicitly agreed to stay proceedings until the Mills and Wicks decision had been received, and explicitly agreed to thereafter permit all parties to argue their position in light of

11. Earlier, but after the decision in Boykin v. Alabama was rendered by this Court, the California Supreme Court similarly used this federal standard to conclude that Boykin principles would not be retroactively applied to felonies in California. (In re Tahl, 1 Cal.3d 122, 133-135.)

that decision. While we agree with petitioner that the Appellate Department agreed to stay its decision in the instant matter until it had had an opportunity to read the opinion in Mills and Wicks which was then pending, we do agree that the Appellate Department went further and agreed to withhold decision until it not only had received the Mills and Wicks opinion but it also had recalendared the matter and heard further argument by the parties.[12/] Not only do the latter representations of petitioner as to what purportedly occurred below not

---

12. The record, we believe, supports our view of what transpired below, namely that at our request and with petitioner's concurrence the Appellate Department agreed to withhold its decision until it had read Mills and Wicks; that prior to oral argument in July 1972 both parties had already filed all briefs permitted by the California Rules of Court; and that at the close of oral argument in July 1972 both parties submitted their case with the singular understanding that the Appellate Department would, on its own, read Mills and Wicks before rendering a decision.

Perhaps it should be pointed out that when an advocate "submits" his case to a court for decision that universally connotes that he has "rested" his case -- which is the end of the matter.

appear to be internally consistent[13], or

---

13. The Petition on page 24 states in effect that it was agreed to defer argument until the case of Mills and Wicks had been decided, and thereafter a new hearing date was to have been set by the Appellate Department. Similarly, on page 25 petitioner states: "Appellant understood that upon receiving the Mills decision this case would be reset on calendar and counsel would be permitted to argue prior to submission (a) the point in the Mills case, and (b) the point in the case of People v. Foulger. . . .", which is taken verbatim from petitioner's PETITION FOR REHEARING AND APPLICATION FOR CERTIFICATION TO DISTRICT COURT OF APPEALS, at page 3, lines 13-21, filed with the Appellate Department of the Superior Court and which is now part of the record before this Court. Yet, in that same Petition for Rehearing at page 3, lines 9-13, and which is also reproduced verbatim in the Petition to this Court on page 25, petitioner states: "The hearing on the appeal was set by the court for July 12, 1973. . . . At said hearing the parties agreed that this case would be held to be argued and then submitted upon the court receiving the decision in the case of Mills. . . ." (Emphasis added.) This last statement, while not entirely clear, seems to say that at the time of oral argument this matter was deemed, i.e., held, to have been argued and submitted once Mills and Wicks had been received and read by the Appellate Department. To the extent our interpretation of this statement is correct it is inconsistent with petitioner's other representations as to what occurred and indeed is supportive of our view of the record below.

logical[14], but we can find absolutely nothing in the record below to support them.[15] Since it is axiomatic that a reviewing court cannot consider matters (factual or

14. Petitioner also states that the Appellate Department explicitly agreed to permit argument both as to the Boykin issue and as to the People v. Foulger issue (viz., admissibility of the breathalyzer result) after the Mills and Wicks opinion had been received. (Emphasis added.) (Brief for Respondent in Opposition to Petition for Writ of Certiorari, page 23, footnote 13, supra; Petition for Writ of Certiorari, page 25; Petition for Rehearing, page 3, lines 13-21.) Since Boykin, and Mills and Wicks, do not, in any way whatsoever, bear on the Foulger issue raised below, there is no conceivable reason for the Appellate Department to postpone a decision on that issue until Mills and Wicks had been received, or to reopen argument on that issue after the receipt of Mills and Wicks.

15. In contrast, the very fact that the Appellate Department below denied the Petition for Rehearing (which contained precisely the same factual representations as are set out in the Petition before this Court) may indeed itself be some evidence that these representations are not correct. After all, the court that reviewed the Petition for Rehearing on its merits is the very court that supposedly agreed some five months earlier to permit further argument after Mills and Wicks had been rendered.

otherwise) not embodied in the record below[16], and since it is equally fundamental that to the extent the record below is silent, ambiguous, or contradictory all presumptions and inferences must be found in support of the judgment below by the reviewing court[17], we accordingly submit that petitioner's representations (and of course the contention that they are supposed to support) are not only improperly before this court but are in fact moot.[18]

---

16. E.g., People v. Jablon [1958] 165 Cal.App.2d 348, 350, citing cases; People v. Moore [1955] 137 Cal.App.2d 197, 204; also see, e.g., People v. Hardeman [1966] 244 Cal.App.2d 1, 21, citing cases.

17. E.g., People v. Redmond [1969] 71 Cal.2d 745, 755; People v. Sweeney [1960] 55 Cal.2d 27, 33; Lerno v. Obergfell [1956] 221 Cal.App.2d 221, 223-224; People v. Bates [1954] 126 Cal.App.2d 144, 145-146; Riley v. Dunbar [1942] 55 Cal.App.2d 452, 455; also see e.g., People v. Newland [1940] 15 Cal.2d 678, 681; People v. Hanggi [1968] 265 Cal.App.2d Supp. 969, 971-972, citing cases.

18. Even assuming, without conceding, that there is in fact some support in the record for petitioner's contention we believe that it nevertheless would lack merit. First, we know of no constitutional requirement, whether under a due process rubic or otherwise, that precludes a court from refusing the further filing of briefs, further arguments, etc., once each party, as they did here, had an opportunity to file at least one brief and to orally argue their

[fn. 18 continued on page 26.]

III

THERE IS NO FEDERAL QUESTION PRESENTED BY THE APPELLATE DEPARTMENT'S REFUSAL TO SUPPRESS THE BREATHALYZER RESULT

Petitioner suggests that the case of People v. Foulger [1972] 26 Cal.App.3d Supp. 1, and the regulations embodied in Group 8, Subchapter 1, Chapter 2 of Title 17, of the California Administrative Code, which are implemented pursuant to California Health and Safety Code sections 436.50 through 436.63, involve constitutional questions, and therefore the refusal to suppress the breathalyzer result in the instant

(fn. 18 continued)

position at least once. Obviously, to permit otherwise opens the door to never ending rehearings, rearguements, and the filing of supplemental briefs, since invariably an advocate, even after he has "rested" his case, will think of some point he forgot to raise or will discover some new (or old) authority he should have cited, ad infinitum. Secondly, once a party has been given an opportunity to be heard and regardless if he has "rested" or not, the decision to permit him to later present new matters or argument, or reopen if he has "rested," is always within the sound discretion of the court that he is before. The exercise of that discretion, whether judicious or not, is governed by local court rules and/or state statutes but certainly does not entail any federal constitutional questions.

matter supports the Petition for Writ of Certiorari. However, People v. Foulger concerns only the effect of noncompliance with these regulations on the admissibility of breathalyzer results, and a review of that opinion (People v. Foulger, 26 Cal.App.3d Supp. 1-6) as well as the regulations (17 California Administrative Code, Chapter 2, Subchapter 1, Group 8, sections 1215-1222.2), fails to expose any federal or constitutional questions. Moreover, in People v. Brannon [1973] 32 Cal.App.3d 971, the Court of Appeal for the Fifth Appellate District of California reviewed People v. Foulger, and in a well reasoned and unanimous decision, also concluded, inter alia, that noncompliance with the regulations under Group 8 of Title 17 of the California Administrative Code raised no constitutional issue and indeed that the case of People v. Foulger itself did not turn on constitutional grounds. (People v. Brannon, 32 Cal.App.3d 971, 975-976, 977-978.)[19]

19. We wish to also point out that not only does People v. Foulger not raise federal questions, but its reasoning has been explicitly overruled as being erroneous by the Court of Appeal in People v. Brannon. (32 Cal.App.3d at 971, 977-978.) Since any Court of Appeal opinion prevails over any Appellate Department of the Superior Court

[fn. 19 continued on page 28]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH P. BUSCH
District Attorney

By

HARRY B. SONDHEIM
Head, Appellate Division

DONALD J. KAPLAN
Deputy District Attorney

CHARLES E. BOAG
Deputy District Attorney

Attorney for Respondent

(fn. 19 continued)

decision under California appellate law (Auto Equity Sales, Inc. v. Superior Court [1962] 57 Cal.2d 450, 455), Foulger cannot be regarded as viable any longer in California. Aside from criticisms expressed in Brannon, Foulger has also been attacked as being diametrically opposed to the California Legislature's strong policies regarding the admission of evidence (see, e.g., California Evidence Code section 351, and Law Review Commission Comments thereunder), and as being in contradiction to other decisional law of California (see, e.g., People v. Wren [1969] 271 Cal.App.2d 788, 791-792; People v. Fite [1968] 267 Cal.App.2d 685, 690-691). (See, e.g., 56 Ops. Cal. Atty. Gen. [1973] 38, 40.) Other aspects of People v. Foulger are set out in Respondent's Brief, pages 2-12 which is now part of the record before this Court, and we respectfully direct this Court's attention to that brief.